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11 THE LARYNGEAL MASK COMPANY LTD.
12 and LMA NORTH AMERICA, INC.

12
13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

14 THE LARYNGEAL MASK COMPANY
15 LTD. and LMA NORTH AMERICA, INC.,

16 Plaintiffs,

17 v.

18 AMBU A/S, AMBU INC., and AMBU
19 LTD.,

20 Defendants.

21
22 AMBU A/S, AMBU INC., and AMBU LTD.,

23 Counterclaimants,

24 v.

25 THE LARYNGEAL MASK COMPANY
26 LTD. and LMA NORTH AMERICA, INC.,

27 Counter-Defendants.
28

Civil Action No. 07 CV 1988 DMS (NLS)

**PLAINTIFFS' OBJECTION TO
EVIDENCE SUBMITTED IN SUPPORT
OF DEFENDANTS' THREE PENDING
SUMMARY JUDGMENT MOTIONS**

Date: September 18, 2009

Time: 1:30 p.m.

Courtroom 10, 2nd Floor

Honorable Dana M. Sabraw

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1 Plaintiffs The Laryngeal Mask Company, Ltd. ("LMC") and LMA North America, Inc.
2 ("LMA NA," collectively "Plaintiffs" or "LMA") hereby object to the evidence submitted by
3 Defendants Ambu A/S, Ambu Inc., and Ambu Ltd. (collectively "Defendants" or "Ambu") in
4 support of Defendants' three pending motions for summary judgment because none of it was
5 timely filed and served. Throughout this litigation, Ambu has repeatedly missed deadlines
6 ordered by this Court. Most recently, Ambu filed its declarations in support of its three pending
7 motions for summary judgment after a longstanding deadline ordered by this Court had passed
8 and Ambu has not subsequently moved for an extension of time. Accordingly, Ambu's
9 evidence should not be considered and its motions for summary judgment should all be denied
10 based on Ambu's chronic tardiness and repeated disregard for this Court's orders.

11 **I. STATEMENT OF PERTINENT FACTS**

12 Ambu has repeatedly missed key filing deadlines in this case. The Scheduling Order
13 includes an order that any party shall "supplement any of its expert reports regarding evidence
14 intended solely to contradict or rebut evidence on the same subject matter identified in an expert
15 report submitted by another party" and that "[a]ny such supplemental reports are due on or
16 before June 19, 2009." Despite this, on June 26, 2009, more than a week after the deadline for
17 filing the report had passed, Ambu supplemented Dr. Lampotang's original opening report
18 without requesting leave to do so. Magistrate Judge Stormes also set July 13, 2009 as the
19 deadline for filing "[a]ll fact discovery motions." [Doc. # 179]. Ambu also missed this deadline
20 when it filed its Motion to Compel Discovery after the deadline. In that instance LMA agreed
21 not to oppose Ambu's request for an extension submitted to the Court. [Doc. # 245]. The
22 Scheduling Order also required that all summary judgment motions "shall be **FILED** on or
23 before August 14, 2009." Ambu again missed this longstanding deadline, which is the basis of
24 this objection.

25 Ironically, shown below is an email sent from Ambu's counsel around 7 p.m. on August
26 14, 2009, requesting that LMA serve its motions for summary judgment to Ambu that day (as
27 required by the Scheduling Order) instead of the following day. The reason for Ambu sending
28 this email is uncertain, as there was no reason to believe that LMA would not comply with its

1 service obligations. In any event, LMA did timely file and serve its summary judgment motions
2 and supporting declarations and evidence, but Ambu did not.

3 -----
4 **From:** Dennis Faigal [mailto:dfaigal@fenwick.com]
5 **Sent:** Friday, August 14, 2009 6:52 PM
6 **To:** John.Sganga; Fred.Berretta; adam.noah@shearman.com; Joshua.Stowell
7 **Cc:** Luz.Wright; Patrick Premo
8 **Subject:** LMA v. Ambu: Confidential Documents Filed under Seal

9 Counsel,
10 Could you please ensure that the un-redacted versions of LMA's motions for summary judgment and supporting
11 documents thereto are served to us tonight, if not already done so, rather than tomorrow?
12 Thank you,
13 Dennis

14 
15 **DENNIS FAIGAL**
16 Fenwick & West LLP
17 Associate, Litigation Group
18 ☎ (650) 335-7834
19 📠 (650) 938-5200
20 ✉ dfaigal@fenwick.com

21 -----
22 Hours later, just twenty minutes before the longstanding deadline ordered by this Court,
23 Ambu first began filing its three motions for summary judgment. Between 11:40 p.m. and
24 11:57 p.m., Ambu filed three notices of motion for summary judgment and supporting
25 memoranda of points and authorities, but failed to file or serve any of its supporting declarations
26 or evidence before the August 14 deadline. The following day, Ambu proceeded to file
27 declarations in support of its motions. Between 12:16 a.m. and 12:54 a.m., Ambu filed three
28 declarations. [Doc. #'s 298, 299, and 300]. In addition to being filed late, one of these
declarations was filed unsigned so essentially was not filed at all. [Doc. # 299].

More than one hour later, between 2:08 a.m. and 3:15 a.m., Ambu filed additional
documents (three motions for leave to file under seal) supporting its summary judgment
motions. [Doc. #'s 301, 302, and 303]. On August 17, 2009, three days after the deadline for
filing, without seeking leave from the Court, Ambu finally filed an amended declaration in
support of its summary judgment motions that included the signature that was previously
omitted. [Doc. # 309]. Ten days after the deadline set-forth by the Court, on August 24, 2009,

1 Ambu submitted Tables of Contents and Tables of Authorities that were not submitted with two
2 of its Memoranda of Points and Authorities as required by the Court's Local Rules. The Court
3 apparently had to request that these missing tables be submitted.

4 In short, all of the declarations and evidence in support of Ambu's motions for summary
5 judgment, all of the associated motions for leave to file under seal, and two sets of tables of
6 authorities and tables of contents were filed with this Court after the August 14 deadline. This
7 was at least the third instance where Ambu failed to meet a deadline set forth by this Court.

8 **II. ARGUMENT**

9 **A. Ambu's Declarations And Evidence In Support Of Its Three Pending Motions For** 10 **Summary Judgment Were Untimely**

11 Federal Rule of Civil Procedure 6(a) establishes how deadlines for filings are computed.
12 *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 930 (9th. Cir. 1994). Specifically, with regard to the
13 last day in a time period specified in a court order, the last day should be included in computing
14 the time period "unless it is a Saturday, Sunday, legal holiday, or- if the act is to be done is
15 filing a paper in court- a day on which weather conditions make the clerk's office inaccessible.
16 The deadline for Ambu to file its motions for summary judgment was on or before August 14,
17 2009. Scheduling Order of June 12, 2008 [Doc. #58]. Accordingly, any motions filed after
18 August 14, 2009 were untimely. *Kyle*, 28 F.3d at 930; *Bellanger v. Health Plan of Nevada, Inc.*,
19 814 F.Supp. 918, 920 (D. Nev. 1993).

20 Local Rule 7.1 of Practice for the United States District Court for the Southern District
21 of California specifies that "[i]n addition to the affidavits required or permitted by Fed. R. Civ.
22 P. 6(d) and 56, copies of all documentary evidence which the movant intends to submit in
23 support of the motion, or other request for ruling by the court, shall be served *and filed with the*
24 *notice of motion.*" CivLR 7.1(f)(2)(a) (emphasis added). Thus, Local Rule 7.1 required Ambu
25 to file its declarations in support of its summary judgment motions with the notices of motion
26 for summary judgment. Instead, Ambu filed all of its declarations and evidence in support of its
27 summary judgment motions, among other required documents, after the deadline had passed.

28 ///

1 **B. The Time For Ambu To File Its Declarations In Support Of Its Motions For**
2 **Summary Judgment Should Not Be Extended**

3 Under Federal Rule of Civil Procedure 6(b), where the specified period for the
4 performance of an act has elapsed, a district court may enlarge the period and permit the tardy
5 act if the tardy actor moves to extend the period for response and establishes that it failed to act
6 because of excusable neglect. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship.*, 507
7 U.S. 380 , 391 (1993). Specifically, the Federal Rules of Civil Procedure state:

8 When an act may or must be done within a specified time, the court may, for
9 good cause, extend the time:

10 (A) with or without motion or notice if the court acts, or if a request is made,
11 before the original time or its extension expires; or

12 (B) on motion made after the time has expired if the party failed to act
13 because of excusable neglect.

14 Fed. R. Civ. P. 6(b)(1). However, Federal Rule 6(b) makes clear that “although extensions
15 before expiration of the time period may be ‘with or without motion or notice,’ any post
16 deadline extension must be ‘upon motion made,’ and is permissible only where the failure to
17 meet the deadline ‘was the result of excusable neglect.’” *Lujan v. Nat’l. Wildlife Fed’n*, 497
18 U.S. 871, 896 (1990). Furthermore, while excusable neglect is an equitable standard,
19 “inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute
20 ‘excusable neglect.’” *Pioneer Inv. Serv. Co.*, 507 U.S. at 392.

21 Here, this Court did not extend the deadline for filing summary judgment motions before
22 the original deadline expired on August 14, 2009. Additionally, Ambu has not subsequently
23 moved to extend the period for filing its summary judgment motions and supporting
24 declarations beyond the deadline ordered by this Court. Lastly, Ambu has not established that
25 its untimely filings were the result of excusable neglect. In fact, Ambu has failed to offer any
26 reasonable excuse or explanation for missing the numerous deadlines it has throughout this
27 litigation, including this one. Moreover, in its email set forth above from counsel Ambu
28 insisted that LMA timely file and serve all its motion papers (which it did). This deadline had
 been on the case docket for over a year. Under these circumstances, after repeated tardy filings

1 and no attempt to explain or even seek leave of Court to file late, the Court should decline to
2 extend the filing deadline for Ambu.

3 **C. Ambu's Untimely Filings Should Be Stricken As Untimely**

4 In *Mendez v. Banco Popular De Puerto Rico*, a First Circuit panel explained:

5 Rules are rules-and the parties must play by them. In the final analysis, the
6 judicial system depends heavily on the judge's credibility. To ensure such
7 credibility, a district court must often be firm in managing crowded dockets
8 and demanding adherence to announced deadlines. If he or she sets a
reasonable due date, parties should not be allowed casually to flout it or
painlessly to escape the foreseeable consequences of noncompliance.

9 *Mendez v. Banco Popular De Puerto Rico*, 900 F.2d 4, 7 (1st Cir. 1990). Similarly, in cases
10 applying Ninth Circuit law, district courts have stricken untimely filings in order to promote
11 judicial efficacy and efficiency. *Marshall v. Gates*, 812 F.Supp. 1050, 1056 (C.D. Cal. 1993);
12 *Bellanger*, 814 F. Supp. at 920 (granting defendant's motion to strike plaintiff's reply in support
13 of plaintiff's motion for summary judgment because reply was filed the day after the deadline
14 for reply). In at least one instance, the Tenth Circuit has also affirmed an order striking a filing
15 as untimely even though it was filed just three days after a court ordered deadline. *Curran v.*
16 *AMI Fireplace Co., Inc.* 163 Fed.Appx. 714, 718 (10th Cir. 2006).

17 The same result should apply here. The Court's due date was reasonable and
18 longstanding on the docket. Even ignoring the tables required by the Local Rules, Ambu did
19 not complete its filing until August 17th when it filed a signed declaration in support of its
20 motions. [Doc. # 309]. Ambu may argue that LMA has not been prejudiced by Ambu's chronic
21 tardiness, but that is not correct. Ambu has had the benefit of seeing LMA's filings before
22 Ambu submits its papers, has taken more time than permitted to prepare its papers, and has
23 caused LMA to waste valuable time in assembling and opposing Ambu's motions. For
24 example, LMA was forced to compare the unsigned declaration of Dr. Lampotang (untimely
25 filed on August 15th) [Doc. # 299] with the even more untimely signed version not filed and
26 served until August 17th [Doc. # 309] to ensure that it had not been substantively modified. This
27 further delayed work on the opposition briefing and wasted LMA's litigation resources.

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III. CONCLUSION

Ambu was fully aware of the impending summary judgment deadline and had been for at least thirteen months since the deadline was first ordered by this Court. Furthermore, Ambu has not moved for an expansion of the missed deadline and has offered no reason or excuse whatsoever for its late filings. Accordingly, based on the foregoing reasons, the Court should sustain LMA's objection to all the evidence submitted in support of Ambu's three pending summary judgment motions, and based thereon deny Ambu's three motions.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: August 28, 2009

By: s/Frederick S. Berretta

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Attorneys for Plaintiffs

THE LARYNGEAL MASK COMPANY LTD.
and LMA NORTH AMERICA, INC.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 28, 2009, I caused the foregoing **PLAINTIFFS'**
3 **OBJECTION TO EVIDENCE SUBMITTED IN SUPPORT OF DEFENDANTS'**
4 **THREE PENDING SUMMARY JUDGMENT MOTIONS** to be electronically filed with
5 the Clerk of the Court using the CM/ECF system which will send electronic notification of
6 such filing to the applicable registered filing users.

7 Darryl M. Woo
8 dwoo@fenwick.com

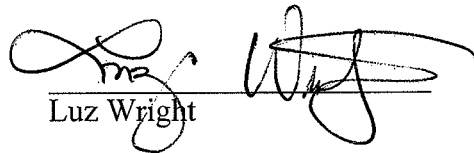
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16 T: 415-875-2300
17 F: 415-281-1350

18 I declare that I am employed in the office of a member of the bar of this Court at
19 whose direction the service was made.

20 Dated: August 28, 2009

21 
22 Luz Wright

23
24 7724832